

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 21 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0384
	)	DEPARTMENT A
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
DONNIE RAY FRANKS JR.,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100760001

Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General  
By Kent E. Cattani and Kathryn A. Damstra

Tucson  
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender  
By Lisa M. Hise

Tucson  
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 Donnie Franks Jr. was convicted after a jury trial of second-degree burglary and theft by control. The trial court sentenced him to enhanced, presumptive, concurrent prison terms of 11.25 years for each offense. On appeal, he argues the court erred by denying his motion for a mistrial and motion for a new trial. We affirm.

¶2 “We view the evidence in the light most favorable to upholding the jury's verdict.” *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In February 2010, the victim returned home to find an unfamiliar truck in her driveway and Franks closing and wiping off her garage door. Franks looked at her, cursed, and jumped in the back of the truck. Fearing for her safety, the victim moved her car so the truck could leave her driveway. Approximately \$20,000 in property had been taken from the victim's home. The truck was registered to Franks and another person.

¶3 Before trial, the trial court granted, in part, Franks's motion to preclude evidence of his criminal history.<sup>1</sup> On the first day of trial, however, a detective testified that “Tucson Police Department actually picked Donnie Franks up[] on several warrants.” The court sustained Franks's immediate objection to the testimony but denied his motion for a mistrial, stating that the detective's reference to “warrants may mean something totally different to a jury [than indicating Franks had previous convictions.]” Franks refused the court's offer to give a limiting instruction. After his conviction, Franks filed a pro se motion for a new trial pursuant to Rule 24.1, Ariz. R. Crim. P., arguing he had

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<sup>1</sup>The trial court determined that sanitized testimony of Franks's previous convictions, limited to the cause number and date of the offense, would be admissible if Franks testified.

been prejudiced by the detective's testimony. The court denied the motion, and this appeal followed.

¶4 “A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.” *State v. Herrera*, 203 Ariz. 131, ¶ 4, 51 P.3d 353, 356 (App. 2002), *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). In deciding whether to grant a motion for mistrial on the basis of a witness's testimony, a trial court must examine “whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and[, if so,] . . . the probability under the circumstances of the case that the testimony influenced the jurors.” *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003). We give great deference to a trial court's decision because it “is in the best position to determine whether the [testimony] will actually affect the outcome of the trial.” *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). Therefore, a denial of a motion for mistrial will not be disturbed absent an abuse of discretion. *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003). Similarly, “[m]otions for new trial are disfavored and should be granted with great caution,” and we “will not disturb a trial court's denial of a motion for new trial absent an abuse of discretion.” *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996), *quoting State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988).

¶5 On appeal, Franks cites several cases decided by our supreme court wherein testimony arguably similar to that at issue here was found to be reversible error. Franks

asserts these cases show “a strong position against the volunteered testimony of police officers regarding the alleged misconduct of criminal defendants.” But those cases clearly are distinguishable; unlike here, in none of those cases is it apparent that the trial court immediately sustained an objection to the improper testimony. *See State v. Gallagher*, 97 Ariz. 1, 7, 396 P.2d 241, 245 (1964), *disapproved on other grounds by State v. Greenawalt*, 128 Ariz. 388, 626 P.2d 118 (1981); *State v. Saenz*, 98 Ariz. 181, 183, 403 P.2d 280, 281 (1965); *State v. Jacobs*, 94 Ariz. 211, 212, 382 P.2d 683, 684 (1963). The jury here was instructed that it was not to consider evidence when an objection to that evidence was sustained. We presume the jury followed those instructions.<sup>2</sup> *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006).

¶6 Additionally, we see no reasonable possibility the detective’s improper testimony affected the outcome of the trial. *See Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d at 839. The evidence against Franks was very strong—the victim identified him both in a photographic lineup and at trial as the man she had seen closing her garage door, wiping it off, and fleeing in the truck. *See Dann*, 205 Ariz. 557, ¶ 46, 74 P.3d at 244 (affirming denial of mistrial where evidence of guilt “overwhelming”); *State v. Hoskins*, 199 Ariz. 127, ¶ 58, 14 P.3d 997, 1013 (2000) (affirming denial of mistrial motion based on “strong circumstantial evidence of defendant’s guilt”).

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<sup>2</sup>To the extent Franks contends that an additional curative instruction was required, he invited any error by refusing the trial court’s offer to give such an instruction. *See State v. Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d 249, 255 (App. 2009) (invited error doctrine “precludes a party who causes or initiates an error from profiting from the error on appeal”).

/s/ *Joseph W. Howard*

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ *Peter J. Eckerstrom*

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PETER J. ECKERSTROM, Presiding Judge

/s/ *J. William Brammer, Jr.*

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J. WILLIAM BRAMMER, JR., Judge

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<sup>3</sup>Franks briefly suggests that the denial of his motions denied his fair trial and due process rights under the United States and Arizona constitutions. To the extent this assertion is separate from his argument that the trial court erred in denying his motions, he does not develop any meaningful argument and we do not address it further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal waives claim).